No. 82-626

Office-Supreme Court, U.S.
FILED
OCT 7 1982
ALEXANDER L. STEVAS
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1982

**JACQUELINE N. RAU,**
*Conditional Cross-Petitioner,*

v.

**SHIRLEY STOVER, et al.,**
*Cross-Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

## CONDITIONAL CROSS-PETITION OF JACQUELINE N. RAU

THOMAS P. SULLIVAN
Counsel of Record
RICHARD T. FRANCH
CHARLES L. BARKER
*Attorneys for*
*Conditional Cross-Petitioner,*
JACQUELINE N. RAU

*Of Counsel:*
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

SHOOK, HARDY & BACON
1101 Walnut
Kansas City, Missouri 64106
(816) 474-6550

October 7, 1982

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

## QUESTIONS PRESENTED

1. Do the unethical *ex parte* communications and the conduct of Judge Wright in this case disqualify him pursuant to 28 U.S.C. § 455(a)?
2. Can class members be fairly and adequately represented in a class action with no class representative?
3. Can class counsel fairly and adequately represent a class member with whom they have a conflict of interest?
4. Should a district court certify a Rule 23(b)(1)(B) class based on plaintiffs' damages as alleged in their complaints?
5. Should a district court certify cases arising out of a mass tort as a mandatory class action?
6. Must a district court which certifies a mandatory class action that denies class members adequate representation permit those class members to opt out?

## LIST OF PARTIES

The parties to the appeal of Jacqueline N. Rau in the Eighth Circuit, No. 82-1207, were: Jacqueline N. Rau and Shirley Stover and all other putative class members similarly situated. The parties to the Petition for Mandamus of Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.* in the Eighth Circuit (No. 82-1181) were: Melanie Hanson Johnson, Gerard Stanley Johnson and all other state court plaintiffs similarly situated; Shirley Stover and all other putative class members similarly situated; and the Honorable Scott O. Wright, United States District Court Judge for the Western District of Missouri.

Crown Center Redevelopment Corp., Hallmark Cards, Inc., Hyatt Corp. and Hyatt Hotels Corp., and the Plaintiffs' Liaison Committee participated in the Eighth Circuit proceeding as *amici curiae*.

## TABLE OF CONTENTS


PAGE

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... i

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

STATUTES AND RULES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

Ms. Rau's State Court Cases, And Her Efforts To Settle Before The District Court's Injunction And Class Certification Order ..... 3

The Federal Cases And The Motion For Class Certification ..... 4

Judge Wright's *Ex Parte* Solicitation Of A Class Representative, And His Injunction And Class Certification Order ..... 6

Events Between The District Court's Order And The Decision Of The Eighth Circuit ..... 8

The Eighth Circuit Opinion, And The Resumption Of Settlements ..... 11

REASONS FOR GRANTING THE CROSS-PETITION ..... 13

Disqualification Under 28 U.S.C. § 455(a) ..... 13

Impropriety of Class Certification ..... 14

PAGE

ARGUMENT ..... 15

I. The Eighth Circuit Erroneously Sanctioned Judge Wright's Solicitation Of Class Representatives And Frustration Of Ms. Rau's Efforts To Be Heard ..... 15

II. The Mandatory Class Action Certified By The District Court Denies Class Members Due Process Of Law And Violates Rule 23 ..... 19

A. Ms. Rau Cannot Be Fairly And Adequately Represented In The Mandatory Class Action As Required By Due Process Of Law And Rule 23(a)(4) ..... 19

1. No Class Member Fairly and Adequately Represents Ms. Rau ..... 20

2. Class Counsel Cannot Fairly and Adequately Represent Ms. Rau ..... 20

B. The District Court's Order Violates Rule 23(b)(1)(B) ..... 22

III. Cases Arising Out Of Mass Torts Should Not Be Certified As Mandatory Class Actions ..... 25

IV. Due Process Requires That The District Court Allow Any Class Member Who Is Not Adequately Represented In A Mandatory Class Action To Opt-Out ..... 28

CONCLUSION ..... 30

PAGE

APPENDIX A ..... 1a

APPENDIX B ..... 41a

APPENDIX C ..... 42a

APPENDIX D ..... 43a

APPENDIX E ..... 66a

APPENDIX F ..... 67a

APPENDIX G ..... 71a

## TABLE OF AUTHORITIES

*Cases*

PAGE

American Trading and Production Corp. v. Fischbach & Moore, Ind., 47 F.R.D. 155 (N.D. Ill. 1969) ..... 29

Battle v. Municipal Housing Authority for the City of Yonkers, 53 F.R.D. 423 (S.D.N.Y. 1971) ..... 29

Bentkowski v. Marfuerza Compania Maritima, S.A., 70 F.R.D. 401 (E.D. Pa. 1976) ..... 25, 28

Causey v. Pan American World Airways, Inc., 66 F.R.D. 392 (E.D. Va. 1975) ..... 25, 26

Clem v. Cooper Communities, Inc., 344 F. Supp 579 (E.D. Ark. 1972) ..... 29

Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977), *petition for mandamus denied sub nom.*, United Light, Heat & Power Co. v. United States District Court, 588 F.2d 543 (6th Cir.), *cert. denied*, 443 U.S. 913 (1979) ..... 24

Daye v. Commonwealth of Pennsylvania, 344 F. Supp. 1337 (E.D. Pa. 1972), *aff'd*, 483 F.2d 294 (3rd Cir. 1973) ..... 25

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) ..... 19

Flanagan v. McDonnell Douglas Corp., 425 U.S. 911 (1976) ..... 27, 28

General Telephone Co. v. EEOC, 446 U.S. 318 (1980) .... 21

George v. United Savings & Loan Assoc., 63 F.R.D. 631 (N.D. Ga. 1974) ..... 24

Goldberg v. Kelly, 397 U.S. 254 (1970) ..... 29

Hansberry v. Lee, 311 U.S. 32 (1940) ..... 19

PAGE

Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970) ..... 25, 26

Hoene v. Associated Dry Goods Corp., 487 S.W.2d 479 (Mo. 1972) ..... 26

In re Agent Orange Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980) ..... 23, 28

In re Boyd, 308 So.2d 13 (Fla. 1975) (per curiam) ..... 18

In re Dekle, 308 So.2d 5 (Fla. 1975) (per curiam) ..... 18

In re Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo. 1982) ..... 4, 5, 6, 7, 8, 15, 23, 24

In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982) ..... 2, 3, 4, 5, 11, 18

In re: Northern District of California, Dalkon Shield IUD Products Liability Litigation, Nos. 81-4648, 81-4649, 81-4650, 81-4651, 81-4652, 81-4653, 81-4654, 81-4655, 81-4656, slip op. (9th Cir. June 18, 1982) ..... 24, 27

La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973) ..... 27, 28

Marchesi v. Eastern Airlines, Inc., 68 F.R.D. 500 (E.D.N.Y. 1975) ..... 25

Marty's Floor Covering Co., Inc. v. GAF Corp., 604 F.2d 266 (4th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980) ..... 18

Matter of Bonin, 375 Mass. 680, 378 N.E.2d 669 (1978) 18

McDonnell Douglas Corp. v. United States District Court for the Central District of California, 523 F.2d 1083 (9th Cir. 1975), *cert. denied sub nom.*, Flanagan v. McDonnell Douglas Corp., 425 U.S. 911 (1976) ..... 27, 28

Ohio Casualty Ins. Co. v. Welfare Finance Co., 75 F.2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935) 23

PAGE

Payton v. Abbott Labs, 83 F.R.D. 382 (D. Mass. 1979) ..... 23-24, 28

Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) .... 29

Powell v. Alabama, 287 U.S. 45 (1932) ..... 29

Pruitt v. Allied Chemical Corp., 85 F.R.D. 100 (E.D. Va. 1980) ..... 23, 28

Rinker v. Ford Motor Company, 567 S.W.2d 655 (Mo. App. D.K.C. 1978) ..... 24

Rex Investigative and Patrol Agency, Inc. v. Collura, 329 F.Supp. 696 (E.D.N.Y. 1971) ..... 29

Roberts v. Anderson, 66 F.2d 874 (10th Cir. 1933) .... 29

SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977) ..... 17

Smith v. Reader's Digest Association, Inc., 19 F.R. Serv.2d 501 (S.D.N.Y. 1974) ..... 28, 29

Snyder v. Harris, 394 U.S. 332 (1969) ..... 20

Stringer v. United States, 233 F.2d 947 (9th Cir. 1956) 18

Sullivan v. Chase Investment Services of Boston, Inc., 79 F.R.D. 246 (N.D. Cal. 1978) ..... 21, 22

Trustees of Central States Southeast and Southwest Areas, Pension Fund v. Indico Corp., 401 So. 2d 904 (Fla. Dist. Ct. App. 1981) ..... 17, 18

Union Light, Heat & Power Co. v. United States District Court, 588 F.2d 543 (6th Cir.), *cert. denied*, 443 U.S. 913 (1979) ..... 24

United States v. Poludniak, 657 F.2d 948 (8th Cir. 1981), *cert. denied sub nom., Weigand* v. *United States*, 102 S.Ct. 1431 (1982) ..... 15

PAGE

United States ex rel. Walker v. Mancusi, 338 F. Supp. 311 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2d Cir. 1972) ..... 29

Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977) ..... 27

Weigand v. United States, 102 S.Ct. 1431 (1982) ..... 15

*Statutes*

28 U.S.C. § 455(a) ..... i, 2, 7, 11, 13, 15, 19, 30

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 1292(a)(1) ..... 1, 11

28 U.S.C. § 2072 ..... 2, 14, 29, 30

28 U.S.C. § 2283 ..... 11

Mo. Rev. Stat. § 537.090 ..... 3

*Rules*

Federal Rule of Civil Procedure 23 ..... i, 2, 5, 7, 14, 19, 20, 22, 23, 27, 28, 29, 30

*Miscellaneous*

American Bar Association Code of Judicial Conduct, Canon 2A, 69 F.R.D. 273 (1975) ..... 2, 17

American Bar Association Code of Judicial Conduct, Canon 3A(4), 69 F.R.D. 273 (1975) ..... 2, 17

7 C. Wright and A Miller, *Federal Practice and Procedure: Civil*, § 1765 (1972) ..... 19

7A C. Wright and A. Miller, *Federal Practice and Procedure: Civil*, § 1783 (1972) ..... 28

Notes of the Advisory Committee on the 1966 Amendments to the Federal Rules of Civil Procedure, 39 F.R.D. 69 ..... 28

# In the
# Supreme Court of the United States

OCTOBER TERM, 1982

---

## No.

---

**JACQUELINE N. RAU,**
*Conditional Cross-Petitioner,*

v.

**SHIRLEY STOVER, et al.,**
*Cross-Respondents.*

---

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

## CONDITIONAL CROSS-PETITION OF JACQUELINE N. RAU

---

If this Court grants the petition of Shirley Stover, *et al.*, No. 82-217, the cross-petitioner, Jacqueline N. Rau, respectfully requests that her cross-petition for a writ of certiorari be granted.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reproduced as Appendix A and published at 680 F.2d 1175. The opinion of the United States District Court for the Western District of Missouri is reproduced as Appendix D and published at 93 F.R.D. 415.

## JURISDICTION

The Eighth Circuit entered its judgment on June 7, 1982, and denied rehearing *en banc* on July 9, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES AND RULES INVOLVED

1. 28 U.S.C. § 455(a) concerning disqualification of judges provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

2. 28 U.S.C. § 2072 authorizing promulgation of the Rules of Civil Procedure is reproduced as Appendix E.

3. Fed. R. Civ. P. 23 concerning class actions is reproduced as Appendix F.

4. American Bar Association Code of Judicial Conduct, Canon 2A, adopted by the Judicial Conference of the United States, 69 F.R.D. 273 (1975), provides:

> A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

5. American Bar Association Code of Judicial Conduct, Canon 3A(4), adopted by the Judicial Conference of the United States, 69 F.R.D. 273 (1975), provides:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. . . .

## STATEMENT OF THE CASE

On July 17, 1981, two skywalks spanning the lobby of the Hyatt Regency Hotel in Kansas City, Missouri, collapsed killing 114 persons and injuring approximately 220 others. App. A, 2a; *In re Federal Skywalk Cases*, 680

F.2d 1175, 1177 (8th Cir. 1982). Among those killed was Dr. Jerold Rau, one of the leading dermatologists in the Kansas City area. His wife, Jacqueline N. Rau, respondent and conditional cross-petitioner in this Court, was injured.

### Ms. Rau's State Court Cases, And Her Efforts To Settle Before The District Court's Injunction And Class Certification Order.

Ms. Rau filed one suit for the wrongful death of Dr. Rau and another suit for her own injuries in the Circuit Court for Jackson County, Missouri. In the death case she seeks actual damages and damages for "aggravating circumstances" under Mo. Rev. Stat. § 537.090. In her personal injury case she seeks actual and punitive damages. Ms. Rau's lead counsel do not represent any other victim of the skywalks collapse.

Ms. Rau's cases are among the 187 cases involving approximately 200 victims of the skywalks collapse filed in the state court. Judge Timothy O'Leary was assigned to handle all of the state court skywalk cases. App. A, 3a; *Federal Skywalk Cases*, 680 F.2d at 1177. He appointed a liaison committee made up of representatives of counsel for plaintiffs and defendants. *Id.* In the fall of 1981, pursuant to a schedule adopted by Judge O'Leary, comprehensive written interrogatories were answered by both plaintiffs and defendants. *Id.* Plaintiffs and defendants produced 300,000 pages of documents which are kept in a depository established by all litigants. *Id.* The liaison committee also negotiated a procedure with interested parties which enabled the National Bureau of Standards to test the skywalks debris and to obtain results which are admissible in evidence. App. A, 3a; 680 F.2d at 1177-78.

At Judge O'Leary's urging, defendant committed $151,000,000 to settle claims. J. App. Ex. 12, 53.[1] By January 25, 1982, 123 claims had been settled for approximately $18,500,000. App. A, 3a; 680 F.2d at 1177 n.5.

Ms. Rau made a detailed written settlement demand to defendants. Counsel for Ms. Rau and defendants met in December, 1981. The negotiations were moving forward until the district court entered its order on January 25, 1982. Defense counsel thereupon terminated the negotiations. App. G.

**The Federal Cases And The Motion For Class Certification.**

Eighteen claimants filed suit in the district court as of January, 1982, on the basis of diversity of citizenship. App. A, 3a; 680 F.2d at 1177 n.5. Those cases were assigned to Judge Scott O. Wright. App. A, 3a; 680 F.2d at 1177. Only five of those actions now remain. A sixth was filed on September 23, 1982.[2]

In September, 1981, Judge Wright appointed a liaison committee to coordinate discovery and trial. App. A, 3a; 680 F.2d at 1177. The plaintiffs' liaison committee was incorporated into the state court committee appointed by Judge O'Leary. *Id.* n.6. Discovery proceeded pursuant to several pre-trial conferences and orders entered by Judge Wright. App. A, 3a; 680 F.2d at 1177. Those orders tracked the orders entered by Judge O'Leary. The written interrogatories and requests for production of

---

[1] "J. App." is the appendix filed by Melanie Hanson Johnson and Gerard Stanley Johnson in the United States Court of Appeals for the Eighth Circuit.

[2] The new plaintiffs are Deborah T. and James W. Jackson; No. 82-0797-CV-W-9. They are citizens of Utah. No defendant is a citizen of Utah. Ms. James sues for emotional distress and minor personal injury. Mr. James sues for loss of consortium.

documents used by both plaintiffs and defendants in the federal cases were the same as those which had been used in the state cases.

On September 1, 1981, a federal court plaintiff with minor injuries, Molly Riley, filed an amended complaint in which she sought certification of a class action. App. D, 44a; *In Re Federal Skywalk Cases*, 93 F.R.D. 415, 419 (W.D. Mo. 1982). In other to achieve diversity of citizenship, Ms. Riley, who is a citizen of Kansas, did not sue two Kansas firms involved in the case. *Id.* On October 27, 1981 she filed a motion for class certification and asked to be named as the class representative. App. A, 4a; 680 F.2d at 1178.

Ms. Riley's lead counsel, Irving Younger and Paul Wolff, practice in Washington, D.C. They asked to be named class counsel. *Id.* None of Ms. Riley's counsel were on the federal or state court appointed plaintiffs' attorneys liaison committees. J. App. Ex. 5, 2.

Respondents Melanie Hanson Johnson and Gerard Stanley Johnson and other federal and state court plaintiffs challenged Ms. Riley's qualifications and those of her attorneys to represent the class and the need for and desirability of class action treatment.[3] App. A, 5a; 680 F.2d at 1178. They also objected to a class under Rule 23(b)(1)(B) because plaintiffs could not opt out of such a class. J. App. Ex. 2, 2; Ex. 7, 6.

On December 10, 1981, the district court conducted a hearing on class certification. J. App. Ex. 35. Counsel for objectors filed one hundred seventy-five affidavits of individual plaintiffs from both state and federal court opposing any form of class action. J. App. Ex. 3, 1. The only federal court plaintiff who expressly supported class certification

---

[3] Counsel for the objectors include Patrick McLarney and David Morris, local counsel for Ms. Rau. J. App. Ex. 2, 4.

without reservation was Ms. Riley. J. App. Ex. 1, Ex. E, 1; J. App. Ex. 35. All defendants opposed certification of a class at that time. J. App. Ex. 35. The defendants disclosed that they had a total of $333,000,000 in insurance coverage. One of the counsel for the objectors estimated that the actual value of all compensatory damages claims arising from the skywalks collapse whether filed in court or not was $150,000,000. J. App. Ex. 11, 33. Hallmark Corporation and Hyatt Coproration disclosed *in camera* their approximate net worths. App. D, 45a; 93 F.R.D. at 419. No evidence was offered proving that the actual value of the victims' claims exceeded the defendants' insuarnce coverage and assets.

### Judge Wright's Ex Parte Solicitation Of A Class Representative, And His Injunction And Class Certification Order.

Judge Wright realized that Ms. Riley could not represent the class because she was not of diverse citizenship from all appropriate defendants.[4] Although no other plaintiff had requested a class action, Judge Wright decided, *sua sponte*, to certify a class. He reviewed the federal complaints to see if the citizenship of any other plaintiffs was diverse from all appropriate defendants and selected plaintiffs Stover, Johnson, Vrabel, Grigsby and Abernathy. He then placed two telephone calls to Ms. Stover's attorney, Robert L. Collins of Houston, Texas. He told Mr. Collins that he intended to certify a class action on January 15, 1982. He asked whether Ms. Stover

[4] The statements in the next paragraph are based in part on Judge Wright's admissions in his order of January 25, 1982, and in part on statements made by attorney Robert L. Collins to plaintiffs' attorneys. App. D, 47a-48a; 93 F.R.D. at 425-28; J. App. Exs. 6, 13-14.

would serve as class representative, and said that if she agreed he would appoint Mr. Collins as assistant class counsel to Ms. Riley's attorney, Irving Younger. They discussed other aspects of the class action, and agreed to speak again after Mr. Collins consulted with Ms. Stover. Mr. Collins and Judge Wright even agreed to meet privately in Kansas City on January 18, 1982.[5]

On January 19, 1982, counsel for the objecting plaintiffs moved pursuant to 28 U.S.C. § 455(a) to disqualify Judge Wright. They appended affidavits concerning the judge's *ex parte* calls to Mr. Collins. J. App. Ex. 15, Exs. A-B.

On January 25, 1982, Judge Wright entered the order from which Ms. Rau appealed. App. D; *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982). He (1) denied Ms. Riley's motion for class certification; (2) certified a class action under Rule 23(b)(1)(A) on the issues of liability for compensatory and punitive damages; (3) certified a class action under Rule 23(b)(1)(B) on the issues of liability for punitive damages and the amount of punitive damages; (4) selected plaintiffs Stover, Vrabel, Grigsby and Abernathy as class representatives;[6] (5) selected Ms. Riley's counsel as lead class counsel, and counsel for the class representatives as assistant class counsel; (6) defined the class members as "business invitees of the [Hyatt Regency] Hotel who suffered physi-

---

[5] Mr. Collins thereupon called defense counsel and attempted to settle Ms. Stover's case. App. A, 6a; 680 F.2d at 1179. During these conversations he revealed the calls from Judge Wright, and urged defendants to settle with Ms. Stover in order to avoid certification of a class. J. App. Ex. 14, 2-3; Ex. 15, 3.

[6] Judge Wright deleted plaintiffs Grigsby, Vrabel and Abernathy as class representatives on February 1, 1982, leaving Ms. Stover as the sole class representative. J. App. Exs. 27-28.

cal, mental, or property damage as the result of the collapse of the two skywalks;" (7) denied the disqualification motion; (8) prohibited class members from settling or prosecuting their state court claims for punitive damages and resolved other issues not relevant to the petition for a writ of certiorari.[7]

The reasons given by Judge Wright for certifying a class were economy and efficiency in handling liability issues in a single trial, fairness to all claimants in light of the risk that defendants would have inadequate funds to pay all punitive damage claims,[8] uncertainty under Missouri law about whether a defendant can be held liable for more than one award of punitive damages for the same conduct, and resolution of possible conflicts of interest on the part of counsel who represent several claimants. App. D, 56a-57a; 93 F.R.D. at 419, 424-25.

**Events Between The District Court's Order And The Decision Of The Eighth Circuit.**

On January 27, 1982, Judge Wright ordered that class members other than the named class representatives could not file pleadings, and that their concerns "should be directed to class counsel." J. App. Ex. 20. On January 29, 1982 Judge Wright ordered that no matter could be presented to the court which concerned a class member unless it was presented by the designated class counsel, except matters pertaining to completed settlements. He directed

---

[7] The terms and impropriety of Judge Wright's prohibition against settlements are discussed in full in Ms. Rau's brief in opposition to the petition of Shirley Stover, *et al.* and will not be repeated in this petition.

[8] Judge Wright found no evidence that funds available from defendants were inadequate to pay compensatory damage claims. He concluded only that "there is a question as to whether sufficient funds are available to pay awards of punitive damages." App. D, 56a; 93 F.R.D. at 424.

the clerk of court to reject any matters not filed by class counsel or defendants' counsel.[9] J. App. Ex. 26.

On January 29, 1982, Judge Wright also quashed notices for depositions of Ms. Stover and Mr. Collins. Counsel for the objecting plaintiffs intended to depose Ms. Stover and Mr. Collins to learn whether they satisfied Rule 23 requirements. J. App. Ex. 22, 1; Ex. 23, 1; Ex. 24, 1-2; Ex. 26.

On February 2, 1982, counsel for several major defendants filed a notice that they would recommence settlement negotiations, but would "only settle such claims in return for a full release of all claims, including a waiver of any claim for punitive damages." J. App. Ex. 33, 1.

On February 10, 1982, class counsel filed a motion *in limine*, in response to the defendants' notice of February 2, 1982, in which they stated, J. App. Ex. 39, 2-3:

> The short answer to the defendants' Notice is that this Court's Order and Memorandum certifying the class forbids individual settlements of claims for punitive damages . . . . As the Court emphasized, settlements of punitive damage claims must be prohibited . . . .

Moreover, as one reason for their emphatic support of the district court's prohibition on settlements, class coun-

---

[9] On February 4, 1982, counsel for Ms. Rau attempted to file her motion to vacate the orders of January 25 and 29, 1982, to disqualify designated counsel because of conflicts of interest, to dismiss for want of subject matter jurisdiction, to decertify the class, to exclude Ms. Rau from the class, to disqualify the class representatives, to disqualify Judge Wright, for leave to take discovery concerning Judge Wright's *ex parte* communications with counsel and comments to the press, and to stay pending review by the Eighth Circuit. The Clerk of the District Court refused to accept or file the motion because it was not signed by class counsel. J. App. Ex. 34, 2.

sel explained that settlements might diminish their attorneys fees.[10]

Class counsel did not consult with Ms. Rau's attorneys before filing their motion *in limine*. App. G.

After class certification, class counsel took only ten depositions. They allowed no participation in discovery by the plaintiffs' liaison committee or the approximately 90 plaintiffs with cases pending in state court. Instead, class counsel commenced settlement negotiations with defendants, negotiations which reportedly included a fee of 2.4 million

---

[10] "Another troubling consequence of defendants' scheme is its unfairness (perhaps intended) to counsel for the class. The proceedings between now and mid-August may well put it beyond doubt that the day of trial will, for one or more defendants, be a day of reckoning indeed. Defendants therefore may raise the level of their offers in order to accelerate the pace of settlement, hoping that by August 16 something close to 100% of the class settles. Assume that defendants succeed and that of August 16, every claim has been settled save that of Shirley Stover, the class representative. If defendants have their way, the verdict in Mrs. Stover's trial for punitive damages will be adversely affected by the settlements with all other class members. The jury's verdict after the evidence of settlement is presented, will be, let us say, $1 million, and the verdict the jury would have rendered had there been no settlements, $500 million. Many of the settlements, in fact, most, if not all, of those occurring shortly prior to trial, will have been made possible by the skill and energy of counsel for the class in prosecuting an action that induced the defendants to agree to settlements. Yet, these efforts will have also brought about a diminution of the fund secured for the non-settling class members. How then is counsel's compensation to be determined? And who is to pay it? The settling class members or those who go to trial? Or both? And in what proportion? If the recoveries generated, in whole or part, by class counsel, are deemed to be anything more than the jury verdict, what is the source of the money to pay whatever the Court allows counsel for the class? We do not now have answers. We merely identify the questions to emphasize the imprudence of defendants' proposal." J. App. Ex. 39, 14 n.7.

dollars plus expenses. *In re Skywalk Cases*, No. CV81-15244-MCF (Cir. Ct. Jackson Cty., Mo. June 3, 1982).

On February 8, 1982, Melanie Hanson Johnson and Gerard Stanley Johnson filed a Petition for a Writ of Mandamus with the Eighth Circuit. On February 9, 1982, Ms. Rau filed her notice of appeal. The notice was based upon 28 U.S.C. § 1292(a)(1), which authorizes appeals from interlocutory orders granting injunctions.

No settlements were negotiated between January 25, 1982, the date of the district court's order, and June 7, 1982, the date of the Eighth Circuit's decision. Affidavit of Michael Waldeck, August 23, 1982, p. 1. Defense counsel declined to even discuss settlement with Ms. Rau's lawyers. App. G.

**The Eighth Circuit Opinion, And The Resumption Of Settlements.**

On June 7, 1982, the United States Court of Appeals for the Eighth Circuit vacated the district court's order. App. A, 19a; *In re Federal Skywalk Cases*, 680 F.2d 1175, 1184 (8th Cir. 1982). The majority held, and Judge Heaney agreed in dissent, that the district court granted an injunction appealable under 28 U.S.C. § 1292(a)(1). App. A, 9a, 20a, 35a-36a n.16; 680 F.2d at 1180, 1185, 1191-92 n.16. The majority held that the district court's injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283. App. A, 14a-17a; 680 F.2d at 1182-83. The majority also held that Judge Wright did not abuse his discretion by refusing to disqualify himself under 28 U.S.C. § 455(a). *Id.* at 1183-84. The majority did not rule on the merits of class certification.

On September 9, 1982, the state court consolidated its skywalk cases for trial. Trial in state court is set for March 14, 1983. *In re Skywalk Cases*, No. CV 81-15244-MCF (Cir. Ct. Jackson Cty., Mo. September 9, 1982).

After the Eighth Circuit mandate became final, petitioners moved for certification of a new mandatory class action

and, alternatively, an opt-out class action under Fed.R.Civ. P. 23(b)(3). *In re Federal Skywalk Cases*, No. 81-0945-A-CV-W-5, slip op. at 4 (W.D. Mo. Sept. 17, 1982). On September 17, 1982, the district court denied petitioners' motion, consolidated the remaining federal skywalk cases for discovery and trial and set the trial for January 10, 1983. *Id.* at 5.6. In its opinion the district court stated, *Id.* at 4-5:

> A hearing was held on September 13, 1982 to determine the propriety of a voluntary class action. From the arguments presented at that hearing, it became apparent that no person, whose citizenship was wholly diverse from all defendants, was willing to represent the Class. The Court was informed that the prior representative, Mrs. Shirley Stover and her children, had settled their cases for a reported sum in excess of 10 million dollars just prior to the hearing. Discovery is presently being conducted for the purpose of ascertaining the propriety of the alleged settlement figure. [footnotes omitted.]

On September 30, 1982, the district court conducted a hearing on the propriety of Shirley Stover's settlement. The court found the terms to be proper but refused to approve the settlement unless defendants agreed not to raise it in this Court. Transcript of hearing before the Honorable Scott O. Wright on September 30, 1982.[10a]

Since the Eighth Circuit's decision, the plaintiffs' and defendants' liaison committees have resumed the discovery process. As of October 1, 1982, the federal and state plaintiffs have deposed 32 witnesses. Moreover, as of August 5, 1982, 47 additional cases have been settled for approximately $5,500,000. Affidavit of Michael Waldeck, August 23, 1982, p. 1.

On August 18, 1982, counsel for Ms. Rau met with representatives of defendants to resume settlement negotiations. Since that meeting, counsel for Ms. Rau and defendants have exchanged correspondence in an ongoing effort to settle her case. App. G.

---

[10a] The page citations to this transcript is unavailable as of October 7, 1982.

## REASONS FOR GRANTING THE CROSS-PETITION

This conditional cross-petition raises the issue of Judge Wright's disqualification, which the Eighth Circuit considered and denied, and issues involving class certification, which the Eighth Circuit did not reach because it vacated the district court's order on alternative grounds. These issues might not be sufficiently important to warrant an independent petition for certiorari. However, if this Court decides to grant the petition of Shirley Stover, *et al.*, No. 82-217, this Court should review the entire case.

**Disqualification Under 28 U.S.C. § 455(a).** Judge Wright procured a class representative who had expressed no interest in the class by initiating *ex parte* telephone calls to her attorney, whom he later appointed as assistant class counsel, in which he discussed the merits of pending motions. He appointed as lead class counsel attorneys who do not represent a class representative and who have a direct and serious conflict of interest with class members with substantial actual damage claims such as Ms. Rau. He failed to disclose to other plaintiffs' counsel his *ex parte* telephone calls until forced to do so by their motion to disqualify. He conditioned his approval of the class representative's settlement on defendants' promise to withhold the knowledge of settlement from this Court. Judge Wright also ordered the Clerk not to accept any class members' motions, except motions filed by lead counsel or assistant class counsel. For these and other reasons, Judge Wright has shown his bias, and should be disqualified under 28 U.S.C. § 455(a).

**Impropriety Of Class Certification.** The mandatory class certified by the district court is improper for five reasons.

First, there is no remaining federal court plaintiff with diversity of citizenship and an interest adequate to fairly represent all class members. Therefore, the putative class members cannot be adequately represented by the class action as required by Fed. R. Civ. P. 23(a)(4).

Second, class counsel advocate enjoining individual class members from settli[illegible] heir state court claims for punitive damages on the ground, among others, that such settlements may diminish their attorneys' fees. No class counsel represents a class representative. Consequently, class counsel cannot adequately or fairly represent class members such as Ms. Rau as required by Fed. R. Civ. P. 23(a)(4).

Third, the evidence was insufficient to support the district court's finding that there was a "limited fund" of defendants' resources. The district court's order certifying a class on this basis was an abuse of discretion.

Fourth, class actions should not be certified in cases arising out of mass torts, such as the skywalks collapse, because of each litigant's vital interest in his or her own personal injury or wrongful death action, and trial attorney. The district court's class certification order to the contrary is an abuse of discretion.

Fifth, Ms. Rau's interests are not fairly and adequately protected by any class representative or class counsel and, therefore, she must be permitted to opt out of any class which may be certified. The district court's order to the contrary violates her right to due process of law and 28 U.S.C. § 2072.

## ARGUMENT

### I.

### THE EIGHTH CIRCUIT ERRONEOUSLY SANCTIONED JUDGE WRIGHT'S SOLICITATION OF CLASS REPRESENTATIVES AND FRUSTRATION OF MS. RAU'S EFFORTS TO BE HEARD.

The purpose of 28 U.S.C. § 455(a) is to prevent the appearance of partiality on the part of a presiding judge. *United States* v. *Poludniak*, 657 F.2d 948, 954 (8th Cir. 1981), *cert. denied sub nom., Weigand* v. *United States*, 102 S.Ct. 1431 (1982). "'[D]isqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.'" *Id.* at 954. Judge Wright's conduct in this case must cause any reasonable person to question his impartiality. The Eighth Circuit erred as a matter of law by employing the wrong standard to evaluate Judge Wright's conduct, and thereby sanctioned conduct so far departed from the usual course of judicial proceedings as to require this Court to exercise its power of supervision.

Judge Wright's partisan behavior apparently began when he "commenced a survey" of court records to determine which plaintiffs who filed suit in the federal court could serve as class representatives, although none but Ms. Riley expressed an interest. App. D, 59a; 93 F.R.D. at 425. Upon completion of his survey, the Judge undertook a secret *ex parte* inquiry into the attitudes of the potential class representatives he had selected. He started by calling Mr. Collins, soliciting Ms. Stover's participation as a class representative and discussing the merits of the case and his forthcoming ruling on the pending

motion for class certification. Judge Wright and Mr. Collins even planned a private meeting to further discuss the matter. Judge Wright gave no notice to counsel for other parties of his *ex parte* calls so that they could protect the rights of their clients.

Judge Wright named as class representatives four plaintiffs, none of whom had moved for class certification, without permitting or conducting any inquiry into the adequacy of their representation of the class.[11] He named as lead counsel the attorney who represents Ms. Riley. All appointed class counsel are burdened with ineradicable conflicts of interest, and have already demonstrated that they cannot and will not fairly represent the class. *See,* 20-22 below.

Judge Wright attempted to insulate the class he certified from attack by unnamed class members. In his order of January 29, 1982, he prohibited individual unnamed class members from conducting the prosecution of "any claim" and from presenting "any matters that are not being filed by counsel for the class or counsel for defendants" except for "matters which pertain to the completed settlement of an unnamed class member's claim." Consequently, the Clerk of the District Court refused to file Ms. Rau's motion to vacate the class action orders and to decertify the class, because her motion was not signed by designated class counsel. Judge Wright continues to attempt to isolate his order from attack. On September 30, 1982 he conditioned his approval of Ms. Stover's settlement, which he concedes is proper, on the promise of defense counsel not to disclose the settlement to this Court.

---

[11] Three of the four plaintiffs were later dismissed as class representatives, leaving only Mr. Collins' client, Ms. Stover.

By this course of conduct, Judge Wright has abandoned his role as impartial arbiter, and has become an advocate for the position of those few plaintiffs who favor class certification and whose interests lie in having the punitive damage claims take priority over compensatory damage claims. He has unilaterally manipulated events and forced a class action after the only movant for certification, Ms. Riley, was found wanting. Now he seems bent on concealing the lack of an adequate class representative from this Court. In doing so, he has engaged in unethical conduct violating Canons 2A and 3A(4) of the Code of Judicial Conduct, and has run roughshod over the legitimate objections of persons, such as Ms. Rau, who are substantially affected by and opposed to what he has done.

Both federal and state courts have found instances of judicial conduct far less egregious than that of Judge Wright to be sufficient justification for disqualification. For example, in *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110 (7th Cir. 1977), the trial judge made an *ex parte* inquiry to determine his attorney-brother's role in a pending case. In ordering disqualification through writ of mandamus, the Seventh Circuit held that "[w]hile it is understandable why the judge may have felt his brother could present the most accurate evidence as to his role in the pending litigation, the judge's inquiry creates an impression of private consultation and appearance of partiality . . . ." *Id.* at 116.

In *Trustees of Central States Southeast and Southwest Areas, Pension Fund* v. *Indico Corp.*, 401 So.2d 904 (Fla. Dist. Ct. App. 1981), the court held that a violation of Canon 3(A)(4) occurred if the trial judge spoke *ex parte* to a former judge who handled a prior aspect of the case but who had since left the bench and joined the firm representing one of the parties. The court held that on remand the trial judge should make a full disclosure, and

if it appeared that the conversation took place the judge should disqualify himself. 401 So.2d at 907. *See also, In re Dekle*, 308 So.2d 5, 11-12 (Fla. 1975) (per curiam); *In re Boyd*, 308 So.2d 13, 21-22 (Fla. 1975) (per curiam); *Matter of Bonin*, 375 Mass. 680, 378 N.E.2d 669, 684-85 (1978).

A motion for disqualification takes precedence over any matter pending in the case in which the motion is made. *See, Marty's Floor Covering Co., Inc.* v. *GAF Corp.*, 604 F.2d 266, 268 (4th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980); *Stringer* v. *United States*, 233 F.2d 947, 948 (9th Cir. 1956). Consequently, Judge Wright's determination of all other issues raised simultaneously with the disqualification question on January 25, 1982 or afterwards were improper and should have been vacated and remanded by the Eighth Circuit for consideration by a new district court judge.

The Eighth Circuit did not condone Judge Wright's *ex parte* communications with Mr. Collins. 680 F.2d at 1184. Yet, because Judge Wright developed something of a record before issuing his order, and because the order was carefully reasoned, the majority concluded that Judge Wright "certified the class based solely on his judgment that such action would best serve the interests of all parties involved." *Id.*

The Eighth Circuit erred. The majority ignored the standard of review for a ruling on disqualification. They acknowledged that the standard was whether the district court abused its discretion when determining whether its impartiality might reasonably be questioned. App. A, 17a; 680 F.2d at 1183. However, they concluded, in essence, that Judge Wright was actually impartial. App. A, 17a; 680 F.2d at 1184. This error alone requires that their decision on the disqualification of Judge Wright be vacated.

Moreover, the record of Judge Wright's objectionable conduct, which now includes his most recent effort to conceal the Stover settlement from this Court, is sufficient to support this Court's reversal of the Eighth Circuit's opinion on disqualification. The conduct of Judge Wright is injudicious in the extreme. It reflects the appearance of bias and partiality which Section 455(a) is designed to avoid and so demeans the integrity of the federal judiciary as to justify this Court's exercise of supervisory power.

## II.

## THE MANDATORY CLASS ACTION CERTIFIED BY THE DISTRICT COURT DENIES CLASS MEMBERS DUE PROCESS OF LAW AND VIOLATES RULE 23.[12]

### A. Ms. Rau Cannot Be Fairly And Adequately Represented In The Mandatory Class Action As Required By Due Process Of Law And Rule 23(a)(4).

The class representative and class counsel must fairly and adequately protect Ms. Rau's interests, as an absent class member, in order to afford her due process of law. *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940). This fundamental notion of fairness is the basis for the requirement of Fed.R.Civ.P. 23(a)(4). *See*, 7 C. Wright and A. Miller, *Federal Practice and Procedures: Civil*, §1765, 617 (1972). The mandatory class certified by Judge Wright and the class counsel he appointed do not afford Ms. Rau due process of law.

---

[12] These errors were raised by Ms. Rau in the district court and on appeal. The district court refused to permit Ms. Rau to file her motions. J. App. Ex. 34. The Eighth Circuit vacated the district court's class certification order on alternative grounds and did not consider any of these errors. Ms. Rau raises these errors by the district court as alternative grounds supporting the decision of the Eighth Circuit. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977).

### 1. No Class member fairly and adequately represents Ms. Rau.

Shirley Stover, the class representative at the time of the Eighth Circuit's decision, has settled her case. As of September 17, 1982, no person whose citizenship is wholly diverse from all defendants, was willing to represent the class.[13]

The only federal court case out of the six still pending in which the plaintiffs' citizenship is wholly diverse from all defendants is that of Deborah T. and James W. Jackson, Civil Action No. 82-0797-CV-W-9, which was filed on Thursday, September 23, 1982. Mrs. Jackson suffered emotional distress and minor injuries from flying glass. Mr. Jackson sues for loss of consortium. Mr. and Mrs. Jackson do not share Ms. Rau's primary interest in compensatory damages for wrongful death as opposed to punitive damages.[14]

In short, there is no adequate representative for the class certified by the district court with the diversity of citizenship necessary to preserve subject matter jurisdiction under this Court's decision in *Snyder* v. *Harris*, 394 U.S. 332 (1969).

### 2. Class counsel cannot fairly and adequately represent Ms. Rau.

Class counsel have demonstrated their inability to fairly and adequately represent Ms. Rau through their

---

[13] Consequently, even the district court declined to certify an opt-out class in this case.

[14] The Jacksons have moved for reconsideration of the district court's order denying certification of a Rule 23(b)(3) class. They have not indicated an interest in representing the mandatory class.

conflict of interest. On February 10, 1982, they filed a motion insisting that the district court prohibit individual class members from settling their state court claims for punitive damages in direct contradiction to the best interests and wishes of Ms. Rau.

Class counsels' conflict of interest stems from the fundamentally divergent interests of class members which make certification of a class action improper in the first place. Ms. Rau has an extremely large and compelling claim for compensatory damages arising out of the death of her husband, Dr. Jerold Rau. In stark contrast, lead class counsels' client, Molly Riley, suffered virtually no injury, and her chief claim and concern is for punitive damages. This situation creates an irremediable conflict of interest for class counsel.

This Court in *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331 (1980) identified the potential conflict of interest presented by analogous circumstances, involving employees and applicants for employment, with each group competing for all or some of the same benefits:

> We note . . . that the adequate-representation requirement [of Rule 23(a)(4)] is typically construed to *foreclose* the class action where there is a conflict of interest between the named plaintiff and the members of the putative class. In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. *Under Rule 23, the same plaintiff could not represent these classes.* (Emphasis supplied.)

In *Sullivan* v. *Chase Investment Services of Boston, Inc.*, 79 F.R.D. 246, 258 (N.D. Cal. 1978), the court agreed to certify a class of plaintiffs in a common-law fraud action only on the condition that the class counsel withdraw

as counsel for different plaintiffs in a securities fraud case pending against the same defendant in another jurisdiction. The court explained that the assets and insurance of the defendant might prove insufficient to satisfy its total liability to all plaintiffs, leaving the interests of the class in obvious conflict with those of counsel's other client. *Id.* at 258. Since "[t]he responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel," the class action could not proceed until counsel had withdrawn from the other case. *Id.*

The real motive which spurs class counsel on is revealed in footnote 7 on page 14 of their February 10, 1982 motion—*attorneys' fees.* The class attorneys oppose settlements of punitive damage claims because those settlements may jeopardize the amount of their anticipated fee award. But what of their duty of undivided loyalty to all members of the class? And what of the public policy favoring settlements? This conduct shows that the interests of all of their clients are not uppermost in their scale of values, and that they are incapable of properly and adequately representing the best interests of all members of the plaintiff class.

Ms. Rau does not need a class to protect her interests. Ms. Rau needs to be protected from class counsel whose announced intentions are selfish and aligned with those plaintiffs whose actual damages are insignificant and are therefore, contrary to Ms. Rau's interests.

**B. The District Court's Order Violates Rule 23(b)(1)(B).**

The district court certified a mandatory class to assure a fair division of punitive damages among all plaintiffs

because of a risk that the assets of liable defendants might be inadequate to satisfy all judgments—the "limited fund" theory—and because of the uncertainty of Missouri law on whether multiple punitive damage awards may be recovered from the same defendant for the same course of conduct.[15] Neither of these reasons is applicable to this case. The district court abused its discretion by certifying a class for these reasons.

The district court's finding of a limited fund was based on the total compensatory and punitive damages claimed in the *ad damnum* clauses of all lawsuits filed as of the date of class certification. App. D, 45a; 93 F.R.D. at 419. There was no evidence that the actual value of plaintiffs claims exceeded the assets of all defendants, including the assets of Hyatt Hotels Corporation and Hallmark Cards, and their $333,000,000 in insurance coverage.[16]

The mere risk of a limited fund based on *ad damnum* clauses is not a sufficient justification to certify a mandatory class. *In re Agent Orange Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980); *Pruitt* v. *Allied Chemical Corp.*, 85 F.R.D. 100 (E.D. Va. 1980); *Payton*

---

[15] It also explained that a mandatory class would indirectly resolve possible conflicts of interest on the part of counsel who represent several claimants. App. D, 57a; 93 F.R.D. at 425. This factor is irrelevant to the provisions of Rule 23(b)(1)(B). Moreover, Ms. Rau's lead counsel do not represent any other victims of the skywalks collapse.

[16] On the contrary, as of September 30, 1982 defendants reportedly settled 190 of the 334 lawsuits and other claims for approximately $29,000,000. New York Times, Oct. 1, 1982 at 45, col. 2. Moreover, under Missouri law, liability insurance is available to pay punitive damage judgments rendered against a principal, such as Hyatt or Hallmark, for the negligent acts of its agents. *Ohio Casualty Ins. Co.* v. *Welfare Finance Co.*, 75 F.2d 58, 59-60 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935).

v. *Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979); *George* v. *United Savings & Loan Association*, 63 F.R.D. 631 (N.D. Ga. 1974). Other courts faced with this issue have required proof that the actual value of plaintiffs claims exceed the resources available to pay them. *In re: Northern District of California, Dalkon Shield IUD Products Liability Litigation*, Nos. 81-4648 to 81-4656, slip op. 6-8 (9th Cir. June 18, 1982); *Coburn* v. *4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977), *petition for mandamus denied sub nom., Union Light, Heat & Power Co.* v. *United States District Court*, 588 F.2d 543 (6th Cir.), *cert. denied*, 443 U.S. 913 (1979).

The proponents of the class have simply not established that the actual value of plaintiffs claims is likely to exceed defendants' ability to pay. The district court's finding to the contrary was an abuse of discretion.

The district court also found Missouri law to be uncertain on the issue of whether a single defendant can be held liable for more than one award of punitive damages. Missouri law is clear on this issue. The Missouri Court of Appeals has rejected the argument that multiple punitive damage awards are inappropriate for design defects, and has held that remittitur is available to protect defendants in that situation. *Rinker* v. *Ford Motor Company*, 567 S.W.2d 655, 668 (Mo. App., D.K.C. 1978). *Rinker* is binding on federal courts applying Missouri law.

In light of the *Rinker* decision, the district court's rationale concerning a single award of punitive damages is erroneous as a matter of law. Together with the district court's insufficient factual findings on the "limited fund," the district court's error justifies the Eighth Circuit's decision vacating the class certification order.

## III.

## CASES ARISING OUT OF MASS TORTS SHOULD NOT BE CERTIFIED AS MANDATORY CLASS ACTIONS.

Unlike many class actions where claims of the unnamed class members are at most of peripheral concern to them, or so minor as to go totally unprosecuted unless aggregated in a class action, the wrongful death and personal injury claims of Ms. Rau and many other class member plaintiffs are the most serious and important of claims. The number of individual actions brought in state and federal court arising out of this tragedy and the vocal opposition of 175 plaintiffs to any form of class action, is evidence that the claims vitally affect the lives of a great many claimants. This is not a situation where the scarcity of individually instituted suits demonstrates a lack of interest in the individual prosecution of cases by potential class members. *Daye* v. *Commonwealth of Pennsylvania*, 344 F.Supp. 1337, 1343 (E.D. Pa. 1972), *aff'd*, 483 F.2d 294 (3d Cir. 1973); *Cf., Bentkowski* v. *Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401, 404-05 (E.D. Pa. 1976).

Protection of the claimants' vital interests in the individual handling of their claims has been held to be a proper ground for denying class certification of a mass tort. *Causey* v. *Pan American World Airways, Inc.*, 66 F.R.D. 392, 399 (E.D. Va. 1975); *Hobbs* v. *Northeast Airlines, Inc.*, 50 F.R.D. 76, 79 (E.D. Pa. 1970). *See, Daye* v. *Commonwealth of Pennsylvania*, 344 F.Supp. 1337, 1343 (E.D. Pa. 1972), *aff'd*, 483 F.2d 294 (3d Cir. 1973). The court in *Causey* also reasoned that class certification of mass accident claims should be denied because they present a wide choice of litigation strategy and tactics, which different litigants and counsel will approach in various ways. 66 F.R.D. at 399. *See, Marchesi* v. *Eastern Airlines, Inc.*, 68 F.R.D. 500, 501 (E.D.N.Y. 1975).

Different interests and trial strategies abound in the skywalk cases. Ms. Rau has brought suit only against those whom she perceives to be the eight major defendants out of twenty entities whom the district court apparently has joined in the class action.[17] If she must go to trial, Ms. Rau wishes to take advantage of Missouri's law granting a right to a twelve person jury and permitting a verdict based on a three-fourths vote of the jurors, a procedure unavailable in federal court.

Under Missouri law, Ms. Rau has the right to adduce evidence at trial on her age, sex, health and *character* in support of her punitive damages claim. *Hoene* v. *Associated Dry Goods Corp.*, 487 S.W.2d 479, 486 (Mo. 1972). This evidence will cause a class trial on punitive damages to degenerate into multiple lawsuits. It will also precipitate a major conflict of interest between class members who seek equal distribution of any punitive damages award among all claimants, and those who can fairly assert that the evidence entitles them to more than an equal share.

Differences in strategy also affect Ms. Rau's right to settle her cases. Counsel for the class insist either that defendants be barred from settling punitive damages claims, or that defendants be barred from adducing evidence that they paid punitive damages to claimants who settle, or that the class be allowed to prove that settlement payments were made by defendants solely for compensatory damages and not for punitive damages. The position of the class counsel benefits class members like Molly Riley who expect their punitive damages to exceed

---

[17] The decision concerning which defendants to sue is a strategic judgment, and each litigant has a vital interest in exercising that judgment independently. *Hobbs* v. *Northeast Airlines, Inc.*, 50 F.R.D. 76, 79 (E.D. Pa. 1970); *Causey* v. *Pan American World Airways, Inc.*, 66 F.R.D. 392, 399 (E.D. Va. 1975).

their nominal compensatory damages. But that strategy is exceedingly damaging to those unnamed class members, such as Ms. Rau, whose compensatory damages far outweigh any punitive damages they expect to collect and who may be willing to settle prior to trial for the reasonable value of their compensatory damages in return for a release of all of their damages claims, compensatory and punitive. The harm imposed upon unnamed class members from class certification under these circumstances simply outweighs the benefits supposedly gained.[18]

In a recent series of decisions, the Ninth Circuit has specifically held that Rule 23(b)(1) class certification of claims arising from a mass accident is inappropriate. *In Re: Northern District of California, Dalkon Shield IUD Products Liability Litigation*, Nos. 81-4648 to 81-4656, *slip op.* 6-8 (9th Cir. June 18, 1982); *Vincent* v. *Hughes Air West, Inc.*, 557 F.2d 759, 767 (9th Cir. 1977); *McDonnell Douglas Corp.* v. *United States District Court for the Central District of California*, 523 F.2d 1083, 1085 (9th Cir. 1975) *cert. denied sub nom., Flanagan* v. *McDonnell Douglas Corp.*, 425 U.S. 911 (1976); *La Mar* v. *H & B Novelty & Loan Co.*, 489 F.2d 461, 465-68 (9th Cir. 1973).

Although there is no conflict among the circuits, this issue is an important one for this Court to address in light of the increasing amount of mass tort litigation and differing views on how it should be handled. Compare *McDonnell Douglas Corp.* v. *United States District Court for the Central District of California*, 523 F.2d 1083 (9th

---

[18] This Court should also note that the various cases arising out of the skywalk collapse were proceeding expeditiously under the auspices of plaintiffs' and defendants' liaison committees in the Circuit Court for Jackson County, Missouri, well before the institution of the class action in federal court, and after the class was vacated. That entire process was disrupted when class counsel controlled the skywalk litigation in federal court.

Cir. 1975), *cert. denied sub nom., Flanagan* v. *McDonnell Douglas Corp.*, 425 U.S. 911 (1976); 7A C. Wright and A. Miller, *Federal Practice and Procedure: Civil*, § 1783 (1972); and Notes of the Advisory Committee on the 1966 Amendments to the Federal Rules of Civil Procedure, 39 F.R.D. 69, 103. This Court should confirm the approach of the Ninth Circuit, and reject class action treatment for mass torts such as the skywalk cases.

## IV.

## DUE PROCESS REQUIRES THAT THE DISTRICT COURT ALLOW ANY CLASS MEMBER WHO IS NOT ADEQUATELY REPRESENTED IN A MANDATORY CLASS ACTION TO OPT-OUT.

The only arguably proper type of class certification for claims arising out of the skywalks collapse would be under Rule 23(b)(3) so that Ms. Rau, who is not adequately represented, may exercise a right to opt-out.

In *Bentkowski* v. *Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401, 402-03 (E.D. Pa. 1976), the court redesignated a class from one under Rule 23(b)(1)(A) to one under 23(b)(3). The trial judge based this change on the view expressed in *McDonnell Douglas* and *LaMar* that cases arising out of mass torts should not be certified as mandatory class actions. Other courts have also denied class certification of mass tort cases under Rule 23(b)(1) or (b)(2) and limited them to Rule 23(b)(3). *In re Agent Orange Product Liability Litigation*, 506 F.Supp. 762, 787-91 (E.D.N.Y. 1980); *Pruitt* v. *Allied Chemical Corp.*, 85 F.R.D. 100, 106-09 (E.D. Va. 1980); *Payton* v. *Abbott Labs*, 83 F.R.D. 382, 388-92 (D. Mass. 1979). *See, Smith* v. *Reader's Digest Association, Inc.*, 19 F.R. Serv.2d 501 (S.D.N.Y. 1974) (class certified under (b)(3) rather than (b)(2) in sex discrimination case where prospect of in-

dividual determinable damage claims exist and a large number of defendant's employees want to have nothing to do with lawsuit); *American Trading and Production Corp.* v. *Fischbach & Moore, Ind.*, 47 F.R.D. 155 (N.D. Ill. 1969) (1,200 exhibitors at housewares convention whose merchandise was destroyed by fire certified as a (b)(3) class).

Ms. Rau must be afforded the right to opt-out even if a mandatory class action is proper in this case.[19] Section 2072 of Title 28 of the United States Code, which authorizes promulgation of Rule 23 by this Court, provides: "Such rules shall not abridge, enlarge or modify any substantive right . . ." The Due Process Clause protects Ms. Rau's right to appear and be heard through counsel of her choice.[20] However, Ms. Rau cannot be represented

---

[19] Courts have allowed opting-out of Rule 23(b)(2) class actions even though Rule 23(b)(2), like Rule 23(b)(1), does not expressly provide for such a procedure. *See, e.g., Battle* v. *Municipal Housing Authority for the City of Yonkers*, 53 F.R.D. 423, 426 (S.D.N.Y. 1971); *Clem* v. *Cooper Communities, Inc.*, 344 F. Supp. 579, 585 (E.D. Ark. 1972); *United States ex rel. Walker* v. *Mancusi*, 388 F. Supp. 311, 316 n.4 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2d Cir. 1972).

[20] *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1117-18 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). This Court has said that "[i]f in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). *Accord, Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970); *Roberts* v. *Anderson*, 66 F.2d 874, 876-78 (10th Cir. 1933); *Rex Investigative and Patrol Agency, Inc.* v. *Collura*, 329 F. Supp. 696, 699 (E.D.N.Y. 1971). Thus, a civil litigant has a constitutional right to the assistance of retained counsel implicit in the concept of due process.

fairly by the designated class attorneys. *See*, pp. 20-22, above. Thus, the district court cannot impose class counsel on Ms. Rau pursuant to Rule 23 without violating her right to due process of law and 28 U.S.C. § 2072.

Even if a class action were appropriate in the skywalk cases, this Court should confirm Ms. Rau's right to opt-out of any class action certified.

## CONCLUSION

Cross-Petitioner respectfully requests that this Court: (1) reverse the decision of the United States Court of Appeals for the Eighth Circuit holding that the district court judge was not disqualified under 28 U.S.C. § 455(a) and remand with instructions to assign the individual skywalk cases to a new judge and (2) affirm the decision of the United States Court of Appeals for the Eighth Circuit vacating the district court's order of January 25, 1982.

Respectfully submitted,

THOMAS P. SULLIVAN
Counsel of Record
RICHARD T. FRANCH
CHARLES L. BARKER

*Of Counsel:*
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

SHOOK, HARDY & BACON
1101 Walnut
Kansas City, Missouri 64106
(816) 474-6550